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No. 09-727

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

RODRIQUE BRADLEY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Second Circuit Court Of Appeal

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORRECTION OF RESPONDENT'S MISSTATEMENTS

1. SENTENCING ENHANCEMENT

In his Statement of the Case Petitioner stated: "The Louisiana Court of Appeal found that this jury form was incorrect but held that the existence of Louisiana Code of Criminal Procedure Article 893.3 factors was not a matter which had to be determined by a jury. (Pet.'s App. P.4)."

The Respondent in its Brief in Opposition at p.4, states that this statement was incorrect and that the Court's holding was not that broad. The Court, however found that the rule of *Apprendi* requiring any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, not to be applicable. Thus the Court stated that:

> The offense of aggravated second degree battery carries a sentence of imprisonment at hard labor for up to 15 years. La. Revised Statute 14:34.7(B). The defendant's sentence, although apparently enhanced under La.C.Cr.P. art. 893.3, is within this range, so there is no violation in this case of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2263, 147 L.Ed.2d 435 (2000), because *Apprendi* only applies when the enhanced sentence is more severe than the maximum sentence for the original offense. (Pet.'s App. P.24).

2. NECESSITY OF IMPRISONMENT AT HARD LABOR UNDER UNENHANCED STATUTE

Respondent also states in its Opposition at p.6 that a sentence under La. Revised Statute 14:34.7(B) " . . . carries a sentence of imprisonment at hard labor . . . " when this statute actually provides that such sentence may be " . . . with or without hard labor. . . ." (Pet.'s App. PP.38-39).

3. CLAIM BY STATE THAT IN LOUISIANA POSSIBILITY OF SUSPENSION OF SENTENCE OR PROBATION IS AN ADMINISTRATIVE RATHER THAN A JUDICIAL FUNCTION

Respondent's Opposition also incorrectly states, without citing any law, at p.6, that

> [p]etitioner argues that because his sentence is subject to the statutory conditions of no suspension of sentence or parole pursuant to La.C.Cr.P. art. 893.3, it exceeds the statutory maximum of La. Revised Statute 14:34.7, for which suspension of sentence and parole are possible for some offenders. Whether petitioner would be otherwise eligible for suspension of sentence or parole is an open question. As this determination is not one that can be made by the sentencing judge, but instead by administrative procedures with the Department of Corrections, petitioner has not shown that the exclusion of the possibility of suspension of sentence or parole increased his maximum sentence exposure.

ARGUMENT

I. THE IMPOSITION OF ADDITIONAL PENALTIES FOR DISCHARGING OF A FIREARM THEREBY CAUSING BODILY INJURY WITHOUT THE JURY FINDING BEYOND A REASONABLE DOUBT THE NECESSARY PREDICATE FACTS CANNOT BE FOUND TO BE HARMLESS ERROR

As the Respondent notes, in the case of *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error . . . " and may be subject to a harmless error analysis.

The State of Louisiana argues that any error was harmless because "[t]he verdict form presented to the jury (Pet.'s App. P.30), although not in perfect form, was such that all elements relevant to petitioner's conviction and sentence were considered by the jury and found beyond a reasonable doubt." (Respondent's Brief P.7). The State then quotes from the Bill of Information, which is not contained in the record, and claims that "[f]or the jury to convict petitioner of this offense, they had to find beyond a reasonable doubt that petitioner committed a battery on T.T. with a gun and thereby intentionally inflicted serious bodily injury" (Respondent's Brief P.8) and that " . . . in this case the State limited itself to proving that a firearm (or "gun") was the dangerous weapon through the language of the Bill of Information." (Respondent's Brief PP.8-9). Such an assertion is contrary to the

argument made by the District Attorney in his closing argument wherein he specifically told the jury that Rodrique Bradley " . . . just happened to have a bat, [he] just happened to have a gun, and [he] just happened to be in a situation where a fifteen-year-old is going to approach [him], and [he] am armed with not one but two weapons." (Reply App. P.2). This statement is also incorrect in that the jury was instructed that it should apply the enhancement under Code of Criminal Procedure Article 893.3(D) if it made certain findings by "clear and convincing" evidence. (Reply App. P.8).

Respondent would show that this error was not harmless because despite the State's contention that the jury had to find that a gun was used, the jury was specifically instructed by the Trial Judge that " . . . it is now my duty to instruct you on the law as applicable to this case." (Reply App. P.2) and " . . . [i]t is, however, your duty to accept the law as given to you and apply it to the facts of this case." (Reply App. PP.2-3). The court then went on to state that "[i]t is my duty to instruct you on the law covering the specific crime of aggravated second degree battery and any lesser included offenses." (Reply App. P.7) and then instructed the jury that it could convict Rodrique Bradley of Aggravated Second Degree Battery by finding that "[a]ggravated second degree battery is battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury." (Reply App. P.7). The term "dangerous weapon" was not defined by the Trial Judge.

The error is further not subject to being found harmless in that rather than requiring a finding of guilt "beyond a reasonable doubt," Louisiana Code of Criminal Procedure Article 893.3 allows, and the jury was instructed, that it could apply the firearm enhancement if it found by "clear and convincing" evidence that certain factors existed. (Reply App. P.8). As this court stated in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) at p.602 "[t]he dispositive question, we said, 'is not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." The Court reiterated this Rule in *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), where it stated that "[t]his Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."

Respondent also incorrectly states, without citing any law, at p.6 of its Brief, that "Petitioner argues that because his sentence is subject to the statutory conditions of no suspension of sentence or parole pursuant to Louisiana Code of Criminal Procedure Article 893.3, it exceeds the statutory maximum of La. Revised Statute 14:34.7, for which suspension of sentence and parole are possible for some offenders. Whether petitioner would be otherwise eligible for

suspension of sentence or parole is an open question. As this determination is not one that can be made by the sentencing judge, but instead by administrative procedures within the Department of Corrections, petitioner has not shown that the exclusion of the possibility of suspension of sentence or parole increased his maximum sentence exposure."

Such a statement is clearly incorrect in that La. Revised Statute 14:34.7 provides for punishment with or without hard labor for not more than fifteen years and provides for no restriction on suspension of sentence or parole eligibility, while under Louisiana Code of Criminal Procedure Articles 893.3(F) & (G) a sentence under Louisiana Code of Criminal Procedure Article 893.3 cannot be suspended and the defendant is not eligible for parole during the fifteen year minimum sentence.

II. THE ELICITING OF TESTIMONY BY THE PROSECUTION THAT RODRIQUE BRADLEY PREVIOUSLY HAD INVOKED HIS FIFTH AMENDMENT RIGHTS WAS CLEARLY NOT HARMLESS ERROR

The State of Louisiana has now conceded in its Brief that "[t]he prosecuting attorney pursued this line of questioning briefly in an attempt to undermine petitioner's story of self-defense, mentioned for the first time at trial." (Respondent's Brief P.11). Given that such questioning is clearly barred by the U.S. Constitution and since it was admittedly intended to undermine the only defense put forth by the

defendant it is respectfully submitted that such error cannot be held to be harmless.

CONCLUSION

The conflict between the Louisiana court and the decisions of this Court as to whether the Sixth Amendment applies to sentencing enhancements, including those that involve denial of probation, parole or suspension of sentence threatens the right of defendants to have all elements of their offenses decided beyond a reasonable doubt by a jury. The lower court decisions also allow prosecutors to deliberately use a defendant's invocation of his right to be silent against him. This Court should grant this Petition and resolve the conflict between the state courts of Louisiana and this Court on these issues.

Respectfully submitted,

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IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR PARISH OF CADDO
SHREVEPORT, LOUISIANA

STATE OF LOUISIANA

VERSUS

RODRIQUE ANTONIO BRADLEY

CRIMINAL CASE NO.: 248,084

TRANSCRIPT OF THE PROCEEDINGS HAD in the trial of the above-styled and numbered cause before HIS HONOR JOHN D. MOSELY, JR., Judge of the First Judicial District Court, in and for Caddo Parish, at Shreveport, Louisiana, on the 24th day of July, 2007, A.D.

APPEARANCES:

MR. RON C. STAMPS
Assistant District Attorney

MR. MICHAEL ENRIGHT
Counsel for Defendant

* * *

[81] [Mr. Ron C. Stamps] something regarding the law. The law is this: That a person who is an aggressor or who brings on a difficulty cannot claim the right of self-defense. That is the law unless he withdraws from the conflict with good faith and such in a manner that he lets the person know.

He started this. It didn't happen on Browning Street. It happened where everybody said it happened. It happened where everybody says it happened. The thing he says is, I just happened to have a bat, I just happened to have a gun, and I just happened to be in a situation where a fifteen-year-old is going to approach me, and I am armed with not one but two weapons. Is that reasonable? Not likely.

What happened was this: Mr. Bradley started the altercation and got more than what he expected. He got more than what he expected. He came expecting that he was going to do harm. He came expecting that he was going to injure that young man. And what he did, what he expected to do is what happened, is exactly what happened. He did nothing less than what he intended to do. It just so happened, I carry a gun, I just happened to be armed with a gun. He never denied even having the bat. Does that sound like a self-defense? Does that sound like self-defense? I think not. The law is clear. If you are the aggressor, you bring it on – guess what? – you can't claim self-defense. That's exactly

* * *

[87] aggressor cannot claim self-defense.

THE COURT: Ladies and gentlemen of the jury, having heard the evidence and arguments of counsel, it is now my duty to instruct you on the law applicable to this case. I am prohibited from commenting on the evidence or from giving an opinion as to what facts have or have not been proven. It is,

however, your duty to accept the law as given to you and apply it to the facts of this case. The jury in this case is the judge of the law as given to you and of the facts on the question of guilt or innocence of the accused.

Your determination of the facts must be based upon evidence presented in open court. The evidence upon which you can base your determination consists of the testimony of the various witnesses, documents received in evidence and exhibits received in evidence in this case. The statements of the district attorney and the defense attorney are not to be considered by you as evidence.

The lawyers have argued their interpretations of the law, the facts they think have proven from the evidence and from inferences based on the evidence and on their conclusions from their interpretation of the law and the facts. These opposing viewpoints are presented to you in arguments by the lawyers to assist you in your deliberations. However, the statements of the lawyers must be separated by you from the evidence admitted in [88] this case.

In making your decision, you are not to be influenced by sympathy, passion, prejudice or public opinion. You are expected to reach a just verdict. It belongs to you, the jury, and to the jury alone, to determine the weight and the credibility of the evidence. The fact that an accused stands before you charged with a crime creates no presumption against that defendant. The charge is a mere accusation

against a defendant and is not evidence of a defendant's guilt, and you must not be influenced by it in considering the case. An indictment or a bill of information is nothing more than a written, formal accusation against a defendant charging the defendant with a crime. You are not to consider the indictment or bill of information as evidence against the defendant. The mere filing of an indictment or bill of information creates no inference whatsoever that the defendant is guilty.

The defendant is presumed to be innocent until each element of the crime necessary to constitute guilt is proven beyond a reasonable doubt. The defendant is not required to prove his innocence. Thus the defendant begins the trial with a clean slate. The burden is upon the State to prove the defendant's guilt beyond a reasonable doubt.

In considering the evidence, you must give the defendant the benefit of every reasonable doubt arising out of the evidence [89] or out of the lack of evidence. If you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

The presumption of innocence is another way of saying that is a person is not guilty until proven otherwise beyond a reasonable doubt. A legal presumption relieves the person in whose favor it exists from the necessity of any proof whatsoever. Nevertheless, a presumption may be destroyed by evidence to the contrary. In other words, a defendant in this

state need not prove his innocence. It is incumbant upon the State to prove his guilt beyond a reasonable doubt. Until so proven an accused is presumed to be innocent.

Proof beyond a reasonable doubt is a phrase that is almost self-explanatory. Reasonable doubt does not mean all possible doubt, but means doubt based upon a reason. If, after you have considered the evidence and the law applicable, there is doubt in your mind as to the guilt of the accused which doubt is based upon a reason or for which doubt you can expression a reason, then the defendant is not guilty. However, proof beyond a reasonable doubt does not mean proof to an absolute certainty.

It is your duty to determine the weight and credibility of the evidence. You may take into consideration the probability or [90] improbability of the statements of the witnesses, their opportunities for knowledge of the facts to which they testify, Their reliability in noting and remembering facts, their demeanor on the stand, the interest or lack of interest they have shown in the case and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements.

If you believe that any witness in this case has willfully and deliberately testified falsely to an material fact for the purpose of deceiving, then you are justified in disregarding the entire testimony of such witness as proving nothing and as not worthy of belief. You have the right to accept as true or reject as

false the testimony of any witness in whole or in part as you are impressed with his truthfulness.

In weighing the evidence, you may determine that two different reasonable conclusions may be drawn from the evidence. Whenever facts, testimony or other evidence are such that two different conclusions may be reasonably drawn therefrom, one conclusion favorable to him and one conclusions not favorable to him, it is you duty to draw the conclusion that is favorable to the defendant.

Evidence is either direct or circumstantial. Direct evidence is evidence which, if believed, proves a fact. Circumstantial, or indirect, evidence which is [91] evidence proves a fact and from that fact, you may logically and reasonably conclude that another fact exists. You cannot find a defendant guilty solely on circumstantial evidence unless the facts proven by the evidence exclude every reasonable hypothesis of innocence.

The accused is not required to testify. And where the accused does not testify, you shall not consider this fact against him or permit it to raise any inference or presumption of guilt against him. However, if a defendant does take the stand and testify, his testimony is to be considered on the same basis as any other witness. You should consider in determining guilt or innocence only those facts testified to and brought out on trial of the case here in court.

Ladies and gentlemen, the defendant, Rodrique A. Bradley is charged with the offense of aggravated

second degree battery upon Tadarious Thomas. It is my duty to instruct you on the law on covering the specific crime of aggravated second degree battery and any lesser included offenses. Revised Statute 14:33 defines battery. Battery is the intentional of force or violence upon the person of another.

Revised Statute 14:34.7 defines aggravated second degree battery. Aggravated second degree battery is a battery committed with a dangerous weapon when the offender [92] intentionally inflicts serious bodily injury. For the purposes of this section, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement or a protracted loss or impairment of the function of a bodily member, organ or mental faculty or a substantial risk of death.

Revised 14:34 defines aggravated battery. Aggravated battery is a battery committed with a dangerous weapon.

Revised Statute 14:34.1 defines second degree battery. Second degree battery is a battery committed without the consent of the victim, when the offender intentionally inflicts serious bodily injury. For the purpose of this article, serious bodily injury means bodily injury which unconsciousness, extreme physical pain or protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty or a substantial risk of death.

Revised Statute 14:35 defines simple battery. Simple battery is a battery committed without the consent of the victim.

Article 893.3(D), if the jury finds by clear and convincing that a firearm was actually used or discharged by the defendant during the commission of a felony or which he was convicted and thereby causes bodily injury, the Court shall impose a term of [93] imprisonment of fifteen years; however, if the maximum sentence for the underlying felony is less than fifteen, the Court shall impose the maximum sentence.

Revised Statute 14:19, use of force or violence in defense. The use of force or violence upon the person of another is justifiable when committed for the purpose of preventing a forcible offense against a person or a forcible offense or trespass against the property in who is in a person's lawful possession, provided that the force or violence used must be reasonable and apparently necessary to prevent such offense.

Revised Statute 14:21, an aggressor cannot claim self-defense. A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

Criminal intent may be specific or general. Specific criminal intent is the state of mind which

exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act. General criminal intent is present when the circumstances indicate that the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or [94] failure to act. General criminal intent is always present where there is specific intent.

Whether criminal intent is present, it must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances. Criminal intent need not be present for any required length of time. It is sufficient if it was present in the mind of the offender at the time of the commission of the offense. The definition of some crimes require a specific criminal intent.

The following are responsive verdicts to aggravated second degree battery: One, guilty as charged; or, two, guilty of aggravated battery; or, three, guilty of second degree battery; or, four, guilty of simple battery; or, five, not guilty.

If the State has failed to prove beyond a reasonable doubt that the defendant is guilty of the offense as charged or of a lesser responsive offense, your verdict should not be guilty. Each juror, having in view the oath taken and the duty and responsibility thereunder, should have his or her own mind convinced beyond a reasonable doubt upon all the evidence before conscientiously consenting to a

verdict of guilty on any count charged. However, this does not preclude the jurors from discussing the evidence in the case so as to assist each other in arriving at the true facts in the case.

[95] When you enter the jury room, it is your duty to consult with one another, to consider each other's views and to discuss the evidence with the objective of reaching a just verdict, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after discussion and impartial consideration of the case with your fellow jurors. You must be unanimous in your verdict. Six of six jurors must agree on any verdict you render in this case.

I will hand you a typewritten form of the possible verdicts you may render in this case. You will select your own foreperson whose duty it will be to conduct your deliberations, mark the line next to the appropriate verdict, date and sign the verdict form and speak for you return into court. The case is now yours to decide.

I will file a copy of the jury charge into the record.

Ms. Bush, would you hold your seat, please.

(Whereupon the jury was sequestered.)

(Whereupon a recess was taken.)

(Whereupon the defendant was present with counsel.)

THE COURT: I understand the jury has reached a verdict.

I ask that you keep all emotions to a minimum, that there be no outbursts or

* * *